

Collegium System of Appointing Judges

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The Supreme Court asked the government to clarify on the status of 55 recommendations made by the Collegium for judicial appointments to various High Courts six months to nearly a year-and-a-half ago. The Collegium System was introduced in response to the executive interference in judicial appointments. However, this system has failed to protect judicial appointments from executive interference. Judiciary is one of the main pillars of the nation in a democratic country. Let's understand the collegium and NJAC system of appointing and transferring the judges.

In news: Supreme Court asks govt. to clarify on 55 Collegium recommendations for judicial postings

Placing it in syllabus: Law & Policy

Dimensions:

- What is the Collegium System?
- Original Provisions of the Constitution
- Evolution of Collegium System
- Importance of Collegium System
- Drawbacks
- NJAC and SC Ruling
- ARC recommendations

Content:

What is the Collegium System?

- Collegium is a system under which the decisions related to appointment and transfer of the judges are taken in India.
- It's a body consisting of the Chief Justice of India,

four senior most judges of the Supreme Court.

- It has no reference in the constitution of India.
- It is the system of appointment and transfer of judges that has evolved through judgments of the Supreme Court, and not by an Act of Parliament or by a provision of the Constitution.

In this system of appointment of Judges, the collegium will recommend the names of the candidates to the Central Government.

Also, the central government will send the names of the proposed candidates for consultation.

The appointment process takes a long time since there isn't a fixed time limit for it. If the Collegium resends the same name again then the government has to give its assent to the names.

Original Provisions of the Constitution:

Article 124 – Appointment of Supreme court judges:

- This article of the Indian constitution talks about the appointment of Supreme Court judges.
- As per this article the judges of the Supreme Court should be appointed by the president in consultation with such judges of the High Courts and the Supreme Court as the President may deem necessary.
- Except in his/her own appointment, the Chief Justice of India should always be consulted in all appointments.

Article 217 – Appointment of High court judges:

- Appointment of the judges of the high court discussed in article 217 of the constitution where it is said that the judges of the high court should be appointed by the president of India in consultation with the chief justice of India and the governor of the state.

- Chief justice of the concerned high court should also be consulted.

Evolution of Collegium System:

The genesis of collegium system lie in the famous “three Judges Cases”, which are:

- SP Gupta Vs Union of India – 1981
- Supreme Court Advocates-on Record Association vs Union of India – 1993
- Article 143 – Opinion of Supreme Court delivered in 1998

Appointment of CJI 1950-1973

- Until 1973, the President appointed the Chief Justice of India and remaining judges of the Supreme Court in consultation with the CJI and other judges as he deemed necessary, in accordance with the provisions of the constitution.
- Until 1973, there existed a consensus between the Government of the day and the Chief Justice of India.
- A convention was formed where the senior-most judge of the Supreme Court was to be appointed as the Chief Justice of India.
- In 1973, A.N.Ray was appointed as the Chief Justice of India. This violated the convention formed earlier since Justice A.N.Ray superseded three other Supreme Court judges senior to him.
- Again in 1977, another chief justice was appointed who superseded his seniors.
- This resulted in a clash between the Executive and the Judiciary.

First Judges Case, 1982

- A petition was filed in 1982 in the Supreme Court of India which is known as the S.P.Gupta Case or First Judges case.

- The Supreme Court discussed 2 major points during the proceedings of this case
- When asked the Supreme Court of India whether the word “consultation” in the constitutional article 124 mean “concurrence”; the Supreme court overruled this and denied saying that Consultation does not mean concurrence. The President was not bound to make a decision based on the consultation of the Supreme Court.
- The court said consultation under Article 124 doesn't mean concurrence (unanimity). Based on this judgement, the President is not bound by CJI's advice.
- Another important point in the discussion, in this case, was the part where the Supreme Court decided that a High Court Judge can be transferred to any other high court of a state even against his will.

Second Judges Case, 1993

- Another petition was filed in 1993 by the Supreme Court Advocates on Record Association (SCARA).
- In this case, the Supreme court overruled its earlier verdict and changed the meaning of consultation to concurrence. Thus binding the President of India with the consultations of the Chief justice of India.
- Further CJI is required to formulate its advice based on a collegium of judges consisting of CJI and two senior-most SC judges
- This resulted in the birth of the Collegium System.

Third Judges Case, 1998

- In the year 1998, the presidential reference to the Supreme court was issued questioning the meaning of the word consultation in articles 124, 217, and 222 of the Constitution.
- The court expanded the collegium to a five-member body to include the CJI and the four senior-most judges of the court after the CJI.

- The chief justice won't be the only one as a part of the consultation process. Consultation would include a collegium of 4 senior-most judges of the Supreme court. Even if 2 of the judges are against the opinion, the CJI will not recommend it to the government.

Importance of Collegium System:

With the growth of populism and autocratic tendencies in democracies, the role of judiciaries has become more important than ever.

The strengths of Collegium System include:

Maintains separation of power of the State:

- It separates the judiciary from the influence of the executive and legislative.
- This ensures impartial and independent functioning.
- So, the collegium system strengthens the principle of separation of powers (no organ of State should intervene in the functioning of another).

Avoids Conflict of Interest:

- The State is the main litigant in Indian Courts.
- About 46% of total cases pending in India pertains to the government.
- If the power to transfer the judges is given to the executive, then the fear of transfer would impede justice delivery.

Brings in Specialization

- The executive organ is not a specialist or does not have the knowledge regarding the requirements of the Judge.
- Therefore, it is better if the collegium system appoints Judges.

Stability in times of political vulnerability:

- The government handling the transfers and appointments is prone to nepotism.
- For example, there is ample evidence where the civil servants were transferred for political gains.
- This scenario is avoided by the present collegium system. Further, the collegium system provides stability to the judges.

Drawbacks :

The critics of the collegium system list the following as its main drawbacks:

Power Asymmetry:

- It gives enormous power to judges that can be easily misused. The collegium system has made India, the only country where judges appoint judges.

Non-Accountability:

- The selection of judges by collegium is undemocratic. Since judges are not accountable to the people or representative of peoples i.e. executive or legislative.

Opaque and Unaccountable System:

- There is no official procedure for selection or any written manual for functioning. This creates an ambiguity in the collegium's functioning.
- There is no structured process to investigate if a judge who is recommended by the collegium has any conflict of interests
- It is a closed door system of appointments having no transparency.
- Without a transparent process of the appointment of judges, the collegium system will not have the credibility and the legitimacy for it to be accepted by all stakeholders within the legal system.

Disproportionate Representation:

- The collegium system prefers practising lawyers rather than appointing and promoting “judges of the subordinate judiciary,” which often comprises a diverse pool of candidates.
- As a result of this, the composition of the high courts becomes, literally, an “old boys’ club” featuring largely male, upper-caste, former practising lawyers.

Allegations of Nepotism:

- Collegium has been fraught with serious allegations of different types of alleged conflict of interest among the members of the collegium and the individuals they have selected to become judges of the High Courts and the Supreme Court.
- Sons and nephews of previous judges or senior lawyers tend to be popular choices for judicial roles.
- Thus, it encourages mediocrity in the judiciary by excluding talented ones and breeds nepotism.

Inordinate Delays:

- The delays over the appointment are still persistent.
- The Supreme Court last appointed a judge in September 2019, and it currently has four vacancies, which is expected to be increased further this year.

NJAC and SC Ruling

In 2014, the National Democratic Alliance government tried to replace the collegium system with the National Judicial Appointments Commission (NJAC).

National Judicial Appointments Commission (NJAC) was a proposed body which would have been responsible for the recruitment, appointment and transfer of judges and legal specialists in India.

The Commission was established by amending the Constitution of India through the ninety-ninth constitution amendment with the Constitution (Ninety-Ninth Amendment) Act, 2014.

Along with the Constitution Amendment Act, the National Judicial Appointments Commission Act, 2014, was also passed by the Parliament of India to regulate the functions of the National Judicial Appointments Commission.

A new article, Article 124A, (which provides for the composition of the NJAC) has been inserted into the Constitution.

It stipulated that the NJAC would consist of –

- Chief Justice of India
- 2 senior most judges of Supreme Court
- Union minister of law and justice
- 2 eminent persons (nominated by CJI, Prime Minister, Leader of opposition in Lok Sabha)

A person would not be recommended by NJAC if any 2 of its members did not accept such recommendation, making the appointment process more broad-based.

The Fourth Judges Case (2015)

- The Collegium system was reaffirmed in 2015 when the Supreme Court of India struck down The National Judicial Appointments Commission Act, or 'NJAC'
- The Court said that the Act violated the principle of judicial independence since political members of the proposed commission held voting power.
- The Court held that the Act gave the government significant powers to appoint Judges.
- The Court held the Act encroached upon the judiciary's independence and undermined the basic structure.
- The court held that the appointment of judges, coupled with primacy of judiciary and the CJI, was part of the

basic structure of the Constitution and that the parliament, through NJAC act, violated this basic structure.

ARC recommendations:

The Second Administrative Reforms Commission (Second ARC) recommended that the appointment of judges to higher courts should be through the participation of the executive, legislature and the Chief Justice. It should be a process above day-to-day politics.

As per the Second ARC recommendations, the National Judicial Council should be authorised to lay down the code of conduct for judges, including the subordinate judiciary.

The proposed council should be entrusted with the task of recommending appointments of Supreme Court and High Court Judges.

NJC should also be entrusted with the task of oversight of the Judges and should be empowered to inquire into alleged misconduct and impose minor penalties along with the power to remove the judge if warranted.

The President should have the powers to remove a Supreme Court or High Court Judge.

The council should have the following composition:

- The Vice President as Chairperson of the Council
- The Prime Minister
- The Speaker of the Lok Sabha
- The Chief Justice of India
- The Law Minister
- The Leader of the Opposition in the Lok Sabha
- The Leader of the Opposition in the Rajya Sabha

Mould your thought: The collegium system must not see itself as being above the safeguards and measures for transparency,

accountability and demographic representation that apply to India's pillars of democracy. Evaluate.

Approach to the answer:

- Introduction
- Define Collegium System
- Discuss its evolution briefly
- Discuss the importance of collegium System
- Discuss the drawbacks of the system
- Conclusion